Supreme Court of the United States

OCTOBER TERM, 1938.

No. 133.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANTS' REPLY BRIEF.

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Statement

Briefs have been filed for appellees in this suit by the United States and the Interstate Commerce Commission jointly; the Warehousemen's Protective Committee; American Warehousemen's Association, Merchandise Division, and jointly by the City of Boston and the Boston Port Authority.

The issue raised in this appeal by appellants' assignments of error is one of law only. It is whether, upon all the findings of fact made by the Interstate Commerce Commission, taken as they stand and at their full face value, an order of the Commission which unequivocally requires the carriers to charge rentals for leased property and rates for

storage services, which are not less than the cost of providing the leased property or performing the storage service, instead of the fair and reasonable value of the lease or service, is a legal order within the power and competence of the Commission to make.

Let us first restate the appellants' contentions in their simplest terms.

1. A concession to a shipper, resulting in a reduction by the amount of such concession in the line-haul rate paid by him for the transportation of his shipment, can arise in connection with the leasing of property to or the storage of freight for such shipper only if the rental for the leased property or the charge for the storage service is less than the fair and reasonable value of the lease or service, so that the shipper receives something of value in excess of what he pays for. That is the very essence of a concession. Without the element of excess value there can, in the very nature of things, be no concession in the transaction.

2. The cost to the carrier of providing the leased property or of performing the storage service, while it may be one of the many factors entitled to weight in determining the fair and reasonable value of the leasehold or storage service, is of itself not the criterion or standard of fair and reasonable value. There can be no concession to the shipper arising solely from the fact that the rental or charge for the leasehold or storage service is below cost. There must be a finding that such rental or charge is also less than the fair and reasonable value. The latter fact, if found, is what gives rise to the concession and consequent violation of the Act which the Commission is authorized by order to correct.

3. If the carriers in this case are making concessions to shippers by charging rentals for leased property or rates for storage that are less than fair and reasonable value, the remedy is to prohibit rentals and storage rates below fair

and reasonable value. Such an order in this case would be proper and its validity could not be questioned by the carriers.

4. But an order prohibiting any lease at a rental below the cost of providing the property, or any storage service at a rate below the cost of performing the service, is wholly unrelated to the assumed evil to be corrected, which arises not out of the below-cost nature of the rental or charge but out of the fact that it may be below fair and reasonable value. Such an order, therefore, since it prohibits a rental or charge that is not in itself unlawful, and does not by such prohibition cure the assumed evil of a concession, is without the power of the Commission, illegal and void.

Now that being, in brief, the appellants' argument, we turn to a consideration of the opposing arguments of the appellees.

Summary of Appellants' Reply Argument.

1. The order unequivocally imposes the cost standard and must stand or fall on the sufficiency of the below-cost findings. All other findings are irrelevant.

2. The Commission has full power, under the fair and reasonable value standard urged by appellants, to correct any practices that may result in concessions or discriminations.

3. A mere loss incurred by a carrier in a lease or storage transaction with a shipper is not enough to establish the giving of a rebate or concession to such shipper, and appellees' contrary claims are untenable. Before a concession can be established it must be further found that the leasehold and the storage provided had, respectively, a fair rental value or a reasonable worth, as ordinarily measured by the prevailing market value and other relevant facts, in excess of what the shipper paid the carrier therefor.

4. A finding that the duly filed and admitted collected tariff charges for appellants' in-transit storage are below cost can not legally establish the granting of a concession, and the lower Court, the Commission and appellees err in their contrary contention.

5. Section 15a of the Act cannot support the order.

6. Appellants have a legal right to make leases at fair rental values and to store goods at the reasonable worth of the storage, and no section of the Act is violated by so doing.

ARGUMENT.

POINT I.

The order unequivocally imposes the cost standard and must stand or fall on the sufficiency of the below-cost findings. All other findings are irrelevant.

The greater part of the briefs of all the appellees is devoted to a meticulous consideration of the factual recitals made in the reports of the Commission, in an endeavor to establish that the Commission found as a fact that the rentals charged by the carriers for leased property and the charges made by them for storage services were not only below the cost of providing the property or performing the services, but were less than the fair and reasonable value of the leaseholds or the storage services.

We reiterate the position taken in our main brief (p. 18), that all this is immaterial because the Commission's order, on its face and by its very terms, forbids appellants to lease property or perform storage services for shippers at rates and charges below the cost of furnishing or providing the same. The order unequivocally and unconditionally prohibits any lease to any shipper and any storage service for any

shipper by a railroad at less than "cost." It commands rigid and unbending adherence to the cost standard at all times and in all circumstances. No matter how many other findings there may be in the Commission's reports, no finding except the below-cost finding can be relied upon in support of the order because the order adopts the "cost" standard, to the exclusion of all else, and thus necessarily excludes all findings made on any other theory.

Moreover, notwithstanding all that is said in appellees' briefs, what the Commission found and what the appellees complain about and assign as the real cause of all the asserted unlawfulness, is basically nothing more than that leases and storage services are offered to shippers at less than cost. That basic claim and finding dominates the three reports. It is the substance of every formal finding made by the Commission as to the leases of each railroad (R., 135, 145, 153, 160, 169); as to the in-transit storage services of each railroad (R., 196, 197, 271) and as to each railroad's commercial or non-transit storage (R., 135, 145, 175). And it was unequivocally accepted by the Court below as presenting the only issue in the case. For that Court said:

> "The power to make the order therefore depends upon whether the providing of such services (leases and storage) as were found to have been furnished for less than cost, violates the act in that some shippers are given more favorable treatment than others in like situation."

and further declared that "fair value is immaterial" on the question of concessions (R., 306, 309).

Therefore, it is wholly irrelevant and immaterial that the Commission's reports may contain statements of fact which can be construed as findings that certain leases were made or storage services performed at rentals or charges which were not only below cost but also below fair and reasonable value. Even if it should be held that the Commission's reports contain such findings, they would be legally irrelevant to the question of the validity of the Commission's

order. They could support and save an order which prohibited the carriers from charging rentals or storage rates less than the fair and reasonable value of the leased property or the storage services. Such an order, if based upon proper findings of fact as to fair and reasonable value, could not be questioned by appellants. But the order with which they are confronted in this case is not an order requiring observance of fair and reasonable value, but solely an order requiring observance of "cost," and must therefore be invalid, unless it can be held that a below-cost rental or storage charge results in a concession to a shipper, regardless of whether or not such rental or charge is below the fair and reasonable value of the property leased or service performed.

That, we submit, is the controlling question in this case, as the lower Court held, and it is solely a question of law as to which any findings that the Commission may have made in regard to fair and reasonable values are wholly irrelevant.

POINT II.

The Commission has full power, under the fair and reasonable value standard urged by appellants, to correct any practices that may result in concessions or discriminations.

Appellees emphasize the alleged wrongfulness of appellants' motives and deeds and the need for correction by an order of the Commission. This extraneous matter can be brought in for no other purpose than to draw attention away from the lack of a sound legal basis for the order and to create an impression that the evils referred to in the Commission's reports can be corrected only by the below-cost order that was entered. The latter thought is expressed in the government brief (pp. 103-5) and is more boldly put in the Warehousemen's Protective Committee brief where it is said (pp. 21-2):

"Two conclusions are inescapable. The Commission cannot compel any corrective action of substance except through incorporation, in its findings and order, of the condition or limitation which is challenged by the appellants. The removal of that limitation by the Courts will license the appellants to continue and augment every phase of their reprehensible practices which were condemned by the Commission."

This appellants categorically deny. The Commission and the courts during the more than fifty years that the Interstate Commerce Act has been in force have been well able to enforce the Act's prohibitions against rebating, concessions and discriminations by applying the same test which appellants here urge: Has the shipper obtained anything of value for less than its reasonable worth?

Appellants recognize that there are conditions referred to in the Commission's reports which justify the entry of an order. They could not complain of an order based on the fair and reasonable value standard. This standard does not, as appellees assume, set up market value as the sole or controlling test. If, for example, the Commission should find, upon adequate evidence, that appellants by wrongful practices had artificially depressed the current market values of leased space and storage services, that fact would properly enter into the determination of the "fair" and "reasonable" value of the rentals and services in question. The powers of the Commission are necessarily broad and appellants are not seeking, by this appeal, to circumscribe or prevent the effective exercise of the Commission's broad powers to stamp out all kinds of concessions and discriminations, by whatever means accomplished.

Appellants must, however, resist the below-cost principle because of the very real injury which it would inflict upon them. All railroads, wholly apart from any warehousing situation, necessarily retain title to many pieces of real property which are not now needed in their carrier operations but which, because of probable future needs or

present unfavorable market conditions, cannot prudently be sold. It is imperative that income be earned through renting such property. Usually a shipper will pay the highest obtainable rental because the ease of access to railroad facilities is an element of value. But if, for example, the property was acquired at the market value prevailing during a period of high prices, and must now be rented during a period of low prices, no one will pay a rental designed to give a return upon costs that are no longer reflected in current property or rental values. The rigid imposition of the cost standard would compel the carrier to leave the property vacant and unproductive of any income. Furthermore, if cost is a valid standard for fixing the minimum rental at which property may be leased to a shipper, it is difficult to advance any reason why it should not also determine the minimum price at which a piece of property may be sold to a shipper. Appellants would suffer heavy losses if they should have to operate under such restrictions.

The adoption of the cost standard in the Commission's reports and order is unqualified and unequivocal. Government counsel, therefore, are not in a position to interpret the order, as they attempt to do on brief (pp. 115-119) as permitting ownership costs to be based on "present-day or current values, no matter what the terms of the lease or the original cost of the building" (Government Brief, p. 115). The order must be interpreted from its face and from the Commission's reports, not from the statements made in the brief of Government counsel. There is no assurance that, if the order were sustained, the Commission would adhere to counsel's interpretation.

POINT 3.

The Commission, the lower Court and all appellees err in concluding that a carrier's loss due to collecting below-cost rentals or storage charges from a shipper is legally sufficient to establish a concession. It must be additionally found that what the carrier collected is less than the fair rental value of the leasehold or the reasonable worth of the storage it provided.

Appellees agree that the fundamental violation of the act found against appellants by the Commission is that they grant concessions or rebates to certain shippers from the tariff rate for transportation in violation of section 6. Concessions or reductions from the tariff rate are the basic illegality with which appellants are charged. The acts out of which the concessions are concluded to arise are the making of leases to and the performance of storage for shippers at rents and charges less than the carriers' cost.

The major contention of appellees throughout their briefs is with respect to what constitutes the concessions. Their position is that if a carrier charges a shipper a rental or storage rate less than sufficient to cover the carrier's cost of providing the property leased or the storage rendered, the carrier's resulting loss automatically and necessarily means that when such shipper ships over the carrier's railroad the tariff rate is, in effect, cut down by the amount of the carrier loss. In other words, their principal argument comes down to the proposition that the mere fact of a carrier loss in a lease or storage transaction is, alone and without more, a concession or rebate to the extent of the loss from the tariff rate in favor of the shipper involved. (Brief, Boston, pp., 7, 8, 26-42; American Warehousemen's Association, pp., 43-

45; Warehousemen's Protective Committee, p., 23.) This is, of course, the position unequivocally taken by both the Commission in its order (R. 272) and by the Court below. The latter said (R. 308):

> "To the extent that the carriers are out of pocket because of the performance of such voluntary commercial services in connection with transportation furnished a shipper, their published tariff rates for such transportation are cut. We are now dealing with the requirement for the maintenance of the published tariff rates for transportation which the Act makes applicable alike to all shippers under like circumstances and if the inducing commercial service which the carriers perform for some shippers to get or hold their business has the effect, as has been made to appear by the evidence and has been found by the Commission, of cutting those tariff rates because out of such rates a loss must be deducted to get the true net transportation return, the transportation service is furnished by the carriers to those shippers for less than to others whether the loss deduction results from commercial services performed at their fair value or not. That is the vice the order is designed to do away with and it will not be cured if the fair value standard is substituted for the cost standard in respect to commercial services performed to get or hold transportation business. If the cost to the carriers of the inducing commercial services performed is more than the charges for those services, the lessening effect upon the published tariff rates for transportation and the consequent violation of the Act allow as surely whether the commercial services are charged at their fair value or not. In other words, fair value is immaterial except on the question of efficiency in connection with the determination of loss."

In pointing out the error in this fundamental position of appellees, appellants cannot do better than to make use of the same three hypothetical examples set forth on page 37 of the brief for Boston. These examples and counsels' dis-

cussion of them embody the substance of all appellees' argument in this connection. So apt are the examples that we quote them as follows:

Example No. 1.

"If the published rate for transportation between points A and B is $10 and a carrier pays $3 out of its treasury to a certain shipper over said route in order to induce the shipper to use the carrier's line, such payment would constitute a violation of Sections 2, 3 and 6 of the Act. This is the simplest illustration of a forbidden rebate."

Example No. 2.

"Similarly, if a carrier pays out of its treasury $3 for a commercial service which it renders to the shipper without charge, to induce him to use the carrier's line, the rendering of such service clearly would constitute a violation of said sections."

Example No. 3.

"If instead of rendering such service free, a carrier, all other circumstances being the same, receives a return from the shipper of $1 for the non-transportation service costing $3, it is submitted that there is equally a violation of sections 2, 3 and 6. The carrier has lost $2 as a result of its commercial service."

With respect to Example No. 1, appellees' own language is that the cash payment of $3.00 constituting the rebate is made by the carrier "to a certain shipper". It is this amount of value given to the shipper, for which he gives nothing in return, that constitutes and measures the rebate. The example says nothing about the carrier's loss in cash value from its treasury or otherwise, and that, of course, is immaterial to the rebate. The significant thing is the gain of value received by the shipper from the carrier that can be applied by the shipper as an offset against or concession from the tariff rate.

In Example No. 2, it is likewise what the shipper gains in the form of the reasonable worth of a service rendered by the carrier "to the shipper without charge", that constitutes and measures the concession. The measure of the concession is no greater than the reasonable worth of the service at the time it is rendered "to the shipper without charge", rather than $3.00, the cost thereof. The point about both the first and second examples is that the concession consists of what is given "to the shipper without charge", whether it is $3 in cash or $3 worth of service or some lower valuation of service, and not what the carrier loses.

Coming now to Example No. 3, where the carrier renders to a shipper a non-transportation service costing $3.00 but collects from the shipper only $1.00 therefor. Appellees contend that the "carrier has lost $2 as a result of its commercial service", and that "The carrier thus reduces its line-haul by $2.00 and receives in effect and through indirection $8 and not $10 therefor"; $10 being the line-haul rate assumed in the example. Appellants emphatically disagree with appellees' entire argument that, upon these facts, the line-haul rate is reduced $2. A tariff rate cannot be reduced unless there is a benefit to a shipper. To say that there is a $2 reduction of the tariff rate under the facts of Example No. 3 overlooks the fact that the shipper actually pays $10, and overlooks also the determining test of concessions, namely, What value does the shipper receive from the carrier in comparison with what he pays to the carrier for the non-transportation service? Examples Nos. 1 and 2 show that the fact and measure of concession depend upon a showing that the shipper actually gets something of value from the carrier without cost to the shipper. That is also the determining test of concession in all the cases analyzed in appellants' initial brief (pp. 19-32), most of which are not referred to at all by appellees and none of which is refuted. Exactly the same determining test must be applied in example No. 3. When it is applied, it becomes clear that there can be no concession to the shipper in that case until it is shown as

a fact that he, too, receives more value in the service furnished by the carrier than he pays for with his $1.00. This indispensable fact of value received by the shipper in excess of the amount paid is not shown by finding merely that the payment of $1.00 was less than the carrier's cost; rather, it is and can be shown only by a finding that the shipper's payment of $1.00 was less than the fair value and reasonable worth of the service the shipper got from the carrier. In other words, in the appellees' third example the shipper pays the tariff rate of $10 for the road haul service and he also pays $1 for the non-transportation service. In such circumstances there is neither reason nor logic in saying that any part of the $10 tariff rate collected is refunded to the shipper until it is found as a fact that the non-transportation service furnished to the shipper has a value exceeding the shipper's $1 payment for it.

In taking the position that the mere fact of a carrier loss establishes a concession irrespective of the shipper's gain, appellees' main reliance is placed upon *Lehigh Valley R. R. Co.* v. *U. S.*, 243 U. S. 444; *Wight* v. *United States*, 167 U. S. 512; *New York Central R. R.* v. *United States*, 212 U. S. 481; *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501 and *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361 (Brief, Government, pp. 88-101; Warehousemen's Protective Committee, p. 23; Boston, pp. 8, 33, 35, 42; American Warehousemen's Association, pp. 40-48). Each of these cases is plainly distinguishable from the instant case and can furnish no support for the cost order here in issue.

Concerning the *Lehigh Valley* case, counsel for Boston (Brief, p. 38) say: "There it did not appear that the shippers' contract with the carrier secured a profit to the shipper or that there was not an equivalence between what the shipper received and the carrier gave." Such a statement is an obvious misreading of the decision. What the carrier did there was to agree to pay in cash to a shipper a "varying per-

centage upon the published rates and a salary of $5000 a year" (p. 445) in consideration of the routing of the shipper's traffic over the railroad and of his efforts to induce others so to do. This Court held that the consideration given by the shipper—acts of shipping and inducing others to do so—was not in law a valuable consideration, and that it is not "allowable to earn money in that way" (p. 446). From this it necessarily followed, as the Court squarely held, that every bit of the cash received by the shipper from the carrier in that case was in law a pure gift to the shipper, and a profit or gain to him without any legal consideration being given by him to the carrier in return. The Court said nothing about loss to the carrier on account of these cash gifts to the shipper. Instead, it squarely held that the entire amount of the cash payments to the shipper, being without any legal consideration at all from the shipper, constituted a refund or concession from the tariff rate in favor of such shipper to the full extent of the amounts paid. In this respect the *Lehigh Valley* case differs distinctly from the instant one. Here it is not even claimed by any one that a refund or concession is established by the mere fact of leasing or storing. The order itself does not purport to prohibit all leasing or storing, but only that which is done at less than railroad cost. By its implicit recognition of the right to lease and store, except at less than cost, it is not open to those who support the rigid cost order to argue that unlawful concessions arise from the mere fact of leasing or storing, as they did in the *Lehigh Valley* case from the mere fact of making any payment whatever to the shipper.

Government counsel cite *Wight* v. *United States*, 167 U. S. 512 and *New York Central R. R.* v. *United States*, 212 U. S. 481, as cases of concessions in which, they argue, the shipper received no benefit or thing of value, whereas the carrier sustained a loss. In the former, the condemned concession was the performance of drayage service from the B. & O.'s freight station to the shipper's warehouse; in the latter, cash rebates were paid. Counsel argue that

these things were of no benefit to the shippers because, in the *Wight* case, the shipper's warehouse was reached by a track of the Pennsylvania Railroad which could have given delivery at the warehouse at the same charge; in the *New York Central* case the shipper could have used competing water transportation at a rate equal to the rail rate less the rebate. This argument closely resembles the argument that was unsuccessfully urged by the defense in the *Wight* case. Counsel disregard the fundamental basis upon which those cases rest: That the shipper, under the Act, shall pay the full tariff rate for the services covered by the tariff and shall receive no additional service or thing of value, unless he shall pay full and adequate consideration therefor. Under the B. & O.'s tariff in the *Wight* case, the shipper was entitled only to delivery at the freight station, but got, for no additional charge, delivery at his warehouse. In the *New York Central* case, the shipper was required to pay the full tariff rate, but got a rebate which cut the rate. In both cases the carrier's expense or loss was purely incidental; the receipt by the shipper without charge of the service or payment not authorized by the tariff constituted the concession. In the instant case, appellants reiterate, a lessee-shipper, for example, gets no benefit or thing of value when he pays (1) the published tariff rate for transportation and (2) the fair rental value of the leased space he occupies.

In *United States* v. *American Tin Plate Company*, 301 U. S. 402, also relied upon by appellees, there were before this Court orders based upon two findings by the Commission. The first one was that railroad transportation service to and from certain large industrial plants there described ended and began on what were known as interchange tracks at or adjacent to each plant, and that the carriers' tariff rates for such transportation did not cover the service between the interchange tracks and points within the plant. The second basic finding was that the carriers nevertheless were performing the service of spotting or handling the cars between the interchange tracks and points within the plant *without*

charge, or were making cash payments to the industry for that service when the industry did it. The Commission ordered the carriers to cease performing or paying the industry for performing the spotting service beyond the interchange tracks, for, upon these basic findings, it concluded as a matter of law that to do either "constituted a refund or remission of a portion of the rate for transportation in violation of Section 6 (7) of the Interstate Commerce Act" (301 U. S. 402, 406). Upon appeal this Court held that the Commission's conclusion was sound and that the two findings mentioned were "sufficient to sustain the orders made" (301 U. S. 402, 409). This was because the findings plainly and definitely showed on their face that whether it performed the service free or paid the industry for doing it, the carrier, in either instance, gave something of great value to the industry for which the industry gave absolutely nothing in return. It was that gift or grant of a thing of value to the industry, in the form of spotting service or cash, that constituted the "refund or remission of a portion of the rate for transportation" in violation of section 6 (7). The carriers' loss incident to performing the service free or paying the industry to perform it had, it is noteworthy, no bearing whatever upon the concession issue, and was not mentioned by the Court.

In the *Merchants Warehouse* case, more fully discussed *infra,* pp. 22-3, the thing condemned was the payment of allowances to "contract" warehouses for the assembling of small shipments into carloads and the distribution of carloads—services which, under the governing tariffs, the carriers could not themselves perform. Thus, as in the *American Tin Plate* case, the allowances were without lawful consideration and were concessions.

Appellees, excepting the Warehousemen's Protective Committee, which does not mention it, also discuss at some length the *New Haven case,* 200 U. S. 361. They rely upon it as the chief support for their position that a loss by a carrier in a lease or storage transaction with a shipper is alone sufficient to establish the grant of a concession from the tariff rate

for transportation, with its consequent discrimination and prejudice. The argument seems to be that, since the loss sustained by the Chesapeake and Ohio from its coal-selling transactions in the *New Haven* case was held to be an unlawful concession with consequent unlawful preferences and prejudices, it follows therefrom that any loss sustained by appellants as a result of their lease and storage transactions in this case is equally unlawful.

The argument is faulty and untenable. That case and the instant one, with respect to the matter of loss, are factually far from parallel. The appellees who rely upon the *New Haven* case overlook, as did both the Court below and the Commission, the crucial fact that in that case it was not the Chesapeake and Ohio's loss, as such, in its capacity as coal dealer that constituted the unlawfulness there found, but rather the fact that the loss sustained arose from the sale of the coal *below its prevailing market value* and resulted in giving the New Haven, the consignee and ultimate payor of the freight charges on the coal, something of value which operated to reduce the freight charges.

It is not open to question that the delivered price of $2.75 per ton at which the coal was sold in New Haven, Conn., was less than the prevailing market value at that place. Conclusive of that are the facts, stated on page 388 of this Court's opinion, that in 1900 and again in 1902, when the Chesapeake and Ohio failed to make deliveries according to schedule under the 1896 contract, the New Haven Railroad "bought coal in the open market" to make up the shortages. It paid in 1900 $160,000 and in 1902 approximately $103,000 more for the then undelivered quotas than the contract price of $2.75, and made damage claims for these amounts against the Chesapeake and Ohio. And this higher market value continued up to the time the contract in question was made in April, 1903 (pp. 376, 403). The very fact that the New Haven Railroad was willing to enter into the verbal contract in April, 1903, for the purchase thereafter of the 60,000 tons then short under the 1896 contract is in itself sufficient proof

that the stipulated price of $2.75 was *less* than the New Haven market price by more than $103,000. This is because the 1896 contract contained a clause (p. 388) expressly releasing the New Haven Railroad from all liability to take the balance of 60,000 tons which had not been delivered prior to July 1, 1902 under the 1896 contract. Being then under no obligation to take delivery of that shortage of tonnage and having a claim of over $103,000 for its non-delivery, there could have been no incentive whatever for the New Haven Railroad to agree in April 1903 to take that tonnage at the price of $2.75 per ton and waive its claim for $103,000 in the bargain, except the obvious one that to buy the same amount of coal in the New Haven market at that time would have cost it more than $103,000 in excess of $2.75 per ton. The New Haven market is therefore established unquestionably as having been far in excess of the sale price of $2.75.

By means of selling below the then prevailing market value and in that way incurring a loss, the Chesapeake and Ohio was able to and did give to the New Haven Railroad, as consignee-buyer, a concession from the tariff rate and the resulting preferences and advantages therein described that no other shipper or consignee could obtain. These positive advantages and preferences to the New Haven resulted directly from the below-market selling. The New Haven, in its argument (p. 373), practically conceded that it received an advantage; "a discrimination in favor of the New Haven road and against others" was averred in the bill (p. 382) and it was the New Haven that appealed (p. 386).

This Court, after fully reciting the facts showing that the coal was sold below origin and destination market value, stated that the question for decision in that case was: "Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery and the published freight rates?" The terms, "price stipulated in the contract", and "cost of purchase", and "cost of deliv-

ery" appearing in the statement of the question must, of course, be given such significance as they had in the light of the facts then before the Court. In those facts, "price stipulated in the contract" referred to the price of $2.75 per ton to be paid by the New Haven Railroad, a price substantially less than the New Haven market value, and the term "cost of purchase" had reference to the contemporaneous agreement of the Chesapeake and Ohio with the mining companies to pay the market value of the coal at mines (pp. 387, 389), together with the "cost of delivery" by boat beyond Hampton Roads to New Haven. Thus, the question at issue in the *New Haven* case, and the one really decided was: "Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold, when the selling price stipulated in the contract does not cover the prevailing market value of the goods sold over and above the published freight rates?

There is a sound and rational basis for the Court's negative answer to that question, despite the fact that such questions are now almost entirely moot by reason of the subsequent enactment of the commodities clause (49 U. S. C., Section 1(8)) prohibiting ownership by a carrier of the goods it transports. The Chesapeake and Ohio, by purchasing goods and contemporaneously selling them at less than the amount of their market value over and above its tariff rates for transporting them, gave to the New Haven Railroad as consignee-buyer the very preferences and discriminatory advantages which, as the Court declared, it was the great purpose of the act to prevent (pp. 391, 392). The Court further declared that the "purpose" of the all-embracing prohibition against either directly or indirectly charging less than the published rates, "was to compel the carrier as a public agent to give equal treatment to all" (p. 392). "Equal treatment to all" is possible only if and so long as the standard of fair market value is observed as the price of what the carrier does outside the field of transportation, rather than the standard of carriers' cost, unless such cost and fair market value are

substantially identical, as they were in the *New Haven* case, and as may generally be assumed to be true in cases of contemporaneous purchase and sale of chattels.

Thus, the *New Haven* case is but another case striking down an arrangement that resulted in a benefit to a favored shipper. In that case, where the element of contemporaneous purchase and sale of chattels was present, the Chesapeake and Ohio's loss constituted and measured the New Haven's gain. Because the former sold the coal for less than the sum of mine price and transportation charges, the latter got the coal for less than that sum—a gain to the New Haven to the extent that the price paid to the Chesapeake and Ohio was less than what the New Haven would have paid, had it bought the coal at the same price at the mine and paid the tariff transportation charges. But in the instant case, the carrier's loss in renting real property or performing a storage service does not result in a gain to the shipper because the transaction which caused the carrier's loss—the purchase of real estate at a price level higher than that now prevailing—is not contemporaneous with the leasing or storage transaction. Because of the intervening time and the fall in real estate and rental values which may go with it, a carrier may incur a loss in renting property or rendering storage service for which it has nevertheless collected from the shipper the fair and reasonable *present* value. If the appellees are right in construing the *New Haven* case as holding that a carrier grants concessions when it does not obtain cost, it must follow that a carrier desiring to sell or lease to a shipper a piece of real estate bought twenty years ago must, to avoid a charge of rebating, sell for original cost or obtain a rental return based on original cost, even though the fair and reasonable market or rental value is much lower. This, the necessary result of the rigid cost order, is not the result of the *New Haven* case, which was merely to strike down an unlawful benefit to a favored shipper. The complete absence of the contemporaneous element in the lease and storage

transactions in the instant case robs the present situation of the vital element of contemporaneousness which, in the *New Haven* case, was necessary to make the carrier's loss a true measure of the shipper's gain.

POINT 4.

A finding that the duly filed and admittedly collected tariff charges for appellants' in-transit storage are below cost can not legally establish the granting of a concession; and the lower Court, the Commission and appellees err in their contrary contentio

With respect to in-transit storage services covered by tariffs, appellants' attack upon the cost order is twofold. First, we contend that the Commission's basic finding that the charges for these services are below cost is legally insufficient to establish a concession, for exactly the same reasons as are set forth at length with respect to the inadequacy of the below-cost finding as to lease rentals (Appellants' Brief, pp. 18-33). Our second attack relates exclusively to the legal significance of the fact that the in-transit charges are all covered by duly filed and admittedly observed tariffs (R. 192, 271). Appellees ignore the point that under the Commission's third report, which expressly reversed the two prior reports in this respect, appellants are affirmatively required to continue to file and keep on file these tariffs (R. 271).

The substance of appellees' argument is that tariffs are but forms of words, and that the publication in tariffs of the rates, rules and regulations for appellants' in-transit storage service is utterly without any legal significance. It is therefore urged, just as the Commission held (R. 271), that the in-transit storage is to be treated as commercial storage the same as if not covered by tariff, and that the finding that the

storage charges named in the tariff are below cost is enough to support the legal conclusion that a concession is thereby granted to all shippers who pay below-cost tariff storage rates. (Brief, Boston, p. 15; American Warehousemen's Association, pp. 48-60; Warehousemen's Protective Committee, p. 25). They cite as authority for the argument *United States* v. *American Tin Plate Company,* 301 U. S. 402, and *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501.

There is irreconcilable conflict, as pointed out in appellants' original brief (p. 38) between the requirement of the third report and that the in-transit services must be covered by filed tariffs and the position of the Commission (Government brief, pp. 106-112) and other appellees that concessions arise on account of the rendition of these same services at the stated tariff charges (R. 271). Appellees rely upon *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, and *United States* v. *American Tin Plate Co.,* 301 U. S. 402, as authority for the proposition that the tariffs in the instant case are of no legal consequence. But these cases do not so hold. In the *Merchants Warehouse* case, the Commission found that certain allowances for loading and unloading of freight at contract warehouses, designated by the carriers as stations, were to gain traffic and compensate the warehouses for solicitation of freight (p. 501); that these warehouses were not in fact public stations (p. 505); that the services of loading and unloading and storage, which the warehouses rendered and which were claimed to be the consideration for the allowances, were not "transportation" for which allowances could be made (pp. 506, 509). The last holding rested mainly on the ground that the principal service rendered by the warehouses was not loading, unloading or storage but was the assembling of smaller shipments into carload lots and the breaking up of carloads into smaller shipments—services which the carriers, under Rules 14 and 23 of the Classification, were not permitted to perform. This Court said:

"* * * The amount of the allowances paid during the four years preceding the hearing aggregated more than $809,000; and the conclusion is inescapable that a very large part of the total is *for the service of breaking up and distributing carloads in less than carload lots, which the carriers could not lawfully perform at their own public freight stations.* Examination of the evidence can leave no doubt that it is the performance of this service, free of charge, to shippers, featured in appellants' advertising and solicitation of patronage, which induces the consignment of freight by shippers to them over the lines of the carriers and withdraws the business from competing warehouses. Such allowances are forbidden, even though paid to appellants and their competitors alike, since, as to both, they would be departures from carload rates of the published tariffs of the carriers and amount to rebates forbidden by Sections 2 and 3 of the Interstate Commerce Act."—283 U. S. 501, 510-11. (Italics supplied.)

Thus, in the *Merchants Warehouse* case, the service of breaking up and distributing carloads, which the Commission found was paid for by the condemned allowances, was not covered by tariff publication at all; in fact, the governing tariffs forbade its performance. Here, on the contrary, the in-transit services and the charges therefor are completely covered by tariff.

In *United States* v. *American Tin Plate Co.*, 301 U. S. 402, the Commission had found that the linehaul rates published by the carriers did not include the service of spotting cars beyond the interchange tracks of certain large industries and that the payment of allowances for service beyond such interchange tracks was a departure from published tariffs in violation of Section 6. But the *American Tin Plate* case does not forbid the carriers from performing spotting services beyond industrial interchange tracks at proper tariff charges. This is conclusively shown in the Commission's report there challenged. *Propriety of Operating Practices—Terminal Services,* 209 I. C. C. 11, 33; see also the Commission's headnotes at page 11 of that decision.

Before the instant case could be analogous to the *Merchants Warehouse* and *American Tin Plate* cases, it would have to be shown that the carriers perform in-transit storage and other services *without any charge* in addition to the line-haul rates. However, that is not the situation; the tariffs provide for, and appellants collect, additional charges for the in-transit services. If there is any illegality in those charges, it must rest upon grounds different from those present in the two cases cited. But the order and supporting findings in the instant case are based wholly upon the inapplicable *Merchants Warehouse* and *American Tin Plate* cases doctrine.

Since the in-transit services have been and must continue to be covered by tariffs which, it is conceded, have been fully complied with, the legal question is, How can a carrier's admitted compliance with the terms of a required in-transit tariff give rise to a concession from its roadhaul tariff? The concepts are mutually contradictory. In the very nature of things, there can be no concession in connection with an in-transit service covered by a required tariff, so long as the stated tariff charge is collected. If the tariff charge for the particular in-transit service is actually collected, manifestly there can be concession given as to *that service*. If as to *that service* there is no concession, it must follow that *that service* cannot cause a concession from the road-haul rates which are likewise uniformly applied in compliance with the tariffs. Appellees have disclosed no legal error in this position.

Appellants pointed out in their original brief (pp. 38-9) that, under the decision of this Court in *Cleveland, C. C. & St. L. R. Co.* v. *Dettlebach*, 239 U. S. 588, the in-transit services are "transportation." This view, which appellants here reaffirm, is challenged in the Government brief (pp. 106-8). Even if counsel were right in this challenge, they could not upset appellants' argument because, as pointed out on pages 41-2 of our original brief, it is not essential that there be a technical determination that the in-transit services

are "transportation." That which the appellees concede—that these services are proper subjects of tariff publication and are covered by duly filed and admittedly observed tariffs—is all that is necessary, as a matter of law, to make impossible the existence of concessions.

It is further argued by appellees that the in-transit storage services, although published in tariffs, are not open to all persons and thus cause unlawful discrimination and prejudice (Brief, Government, p. 111; Warehousemen's Protective Committee, p. 27; Boston, pp. 7, 21). No reference, however, is made to any finding by the Commission that any particular shipper on any particular occasion was ever denied by any carrier full opportunity to avail himself of the tariff privileges if he so desired. The findings referred to (R., 192, 197) go merely to the below-cost character of the storage and other charges. Apparently what is really meant by saying that the services are not open to all under the tariffs is no more than that certain shippers "have no need for" in-transit services (Brief, Boston, pp. 21, 33). There is obviously little merit in a contention of unavailability on the part of one who either has no need for or ability to use a tariff service. It has been settled since the Commission's early decision in *American Warehousemen's Association* v. *Illinois Central R. R. Co.*, 7 I. C. C. 556, that "impartiality and publication" satisfy the requirements of the law. Any contention based on unavailability is foreclosed here because the below-cost order is bottomed wholly upon the concession theory, which is embodied also in the supporting concession findings. Neither order nor findings are based upon discriminatory operation, apart from alleged below-cost concessions, of the condemned tariff provisions.

POINT 5.

Section 15a of the Act cannot support the order.

In an effort to escape the demonstrated invalidity of the order as an exercise of power under Sections 2, 3 and 6 of the Act, final resort is had to Section 15a to support it as necessary to secure efficiency and economy in appellants' operations (Briefs, Government, pp. 102-106; Warehousemen's Protective Committee, p. 30. Neither of the other appellants makes any contention on that ground). The complete answer to this argument is that the situation in which Section 15a may be invoked is not presented here and, even if it were, there are no findings in the instant case upon which Section 15a might be made to operate.

First, as to the lack of a proper premise, the language of the section makes it plain that it is only "in the exercise of its power to prescribe just and reasonable rates" that the Commission may invoke that section. Manifestly, the Commission has not undertaken in the instant case "to prescribe just and reasonable rates" and no appellee makes any such suggestion. This entire absence of the whole premise upon which power under Section 15a may be exercised, therefore, precludes any valid claim that the assailed order is a proper exercise of such power.

Second, the Commission did not find that to prohibit appellants to lease or store at less than cost would give them more revenue. "The raising of rates," as this Court has said, "does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it by discouraging patronage."—*Florida* v. *United States*, 282 U. S. 194, 214.

What is necessary in the way of findings to support the present order under Section 15a was well set forth by the statutory District Court for the Southern District of New York in *Baltimore and Ohio RR. Co.* v. *United States*, 22

F. Supp. 533. That was a case in which the Commission had ordered certain transportation rates reduced on the ground that, although they were not unreasonable, the reduction might bring the carriers more traffic and revenue and thus greater efficiency and economy. However, the governing principles there applied by the Court to determine what findings were there necessary are equally applicable to the instant order if it is attempted to justify it as one made for the same purpose of efficiency and economy. The Court held with respect to the power of the Commission to change rates for purposes of efficiency and economy that (p. 536):

> "if that power exists its exercise depends upon a good many other variables than those relevant merely to fixing the usual reasonable rate.
>
> "The Commission must go on to consider how much new traffic the reduction will move, what will be the profit on it, and how it will affect the other traffic upon the carrier's lines.
>
> "We do not suggest the answer to these questions, except to say that if the power exists, such answers there must be, at least to what touches the carrier directly affected.
>
> "This serves to indicate the complexity of the problem, once it be conceded that rates may be fixed with an eye, not alone to their reasonableness considered by itself—a sufficiently manifold quest in itself—but to the possibility that though reduced below what would otherwise be reasonable, they will still bring additional revenue which will strengthen the carrier concerned, or that carrier and others as well."

Findings that will answer these same questions are as indispensable here as in the case cited.

POINT 6.

Appellants have a legal right to make leases at fair rental values and to store goods at the reasonable worth of the storage, and no section of the Act is violated by so doing.

In appellants' initial brief (pp. 29-33) the decisions of this Court and of other courts, as well as of the Commission supporting this proposition are cited and briefly discussed. Appellees have not contradicted or explained away the force or effect of these authorities. By supporting the order they, of course, concede the carriers' right to lease and store, for the order itself does not purport to prohibit all the leasing and storage, but only such as is done at less than cost.

Two of the briefs of appellees reveal that appellants' contention for the right to make leases at fair rental values, rather than to be bound by cost, is precisely the standard which the private warehouse industry itself approves and follows. In the brief for American Warehousemen's Association (note, p. 45) it is stated as the industry's position and practice that rents *"should be based on such present values as to give a fair rental amount as of today, no matter what be the original cost of the building."* (Italics in original). Government counsel likewise adopt fair rental value rather than cost as the proper standard. In their brief (p. 115) it is stated that "the item of rent, or in lieu thereof, the costs incident to ownership, are to be based on present-day or current values, no matter what the terms of the lease or the original cost of the building."

The Commission also, in a decision announced by it as recently as October 11, 1938, in *Freight Forwarding Investigation*, 229 I. C. C. 201, has not followed the cost standard of rentals imposed by the order in this case and, instead, has reaffirmed the fair-value-standard previously adopted and followed by it in *Leases and Grants by Carriers to Shippers*, 73 I. C. C. 671, 683, and *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663, 691. The whole problem of

carriers' right to make leases to shippers and rental standards to be observed in so doing was involved in the *Freight Forwarding* case and, after full review by the Commission, the rule announced with respect to rentals (p. 215) was that "Respondents should lease facilities to forwarders [shippers] at terms certainly no less favorable to the lessors than are embodied in leases by others of somewhat similar facilities in the same community."

The Commission further says (p. 216) to the extent that the rentals are inadequate "the forwarders receive concession from the tariff rates", and Commissioner Eastman in his separate opinion further affirms that as to leasing (p. 319) "The real question seems to be whether the rentals are less than the going rental value of property available and suitable for the purpose, and the record does not enable a definite finding on this point."

The failure of the Commission by its order in the *Freight Forwarding* case to prescribe cost as the rental standard is conspicuously significant. The legal question as to the rental standard a carrier may observe without violating the act is in the instant case no different from what it was in the *Freight Forwarding* case, and no different standard should be imposed. The warehouse industry's admitted adherence to the standard of fair rental values rather than cost, and the Commission's own sanction of that standard since promulgation of its order in this case, are but persuasive confirmation of the legal soundness of appellants' contention for the right to observe that standard rather than be held to the impractical and unlawful cost standard.

CONCLUSION.

We have then, in last analysis, the simple situation of an order that unqualifiedly prohibits any leasing and storing at less than cost. It rests alone upon the finding that appellants now do such leasing and storing, and upon the Commission's legal conclusion that concessions are thereby given in violation of section 6. Being concededly (R., 104) without power to make the order save as a cure for some

infraction of the act, it follows necessarily that if the Commission was wrong in its legal conclusion that a below-cost rental or storage charge to a shipper is alone adequate proof of an infraction by way of a concession to such shipper, the whole foundation for the order disappears. The fundamental legal error of that conclusion has been shown herein (pp. 9-21 *supra*) and in appellants' initial brief (pp. 18-33). What is there set forth to show the error of concluding that a below-cost finding is adequate to prove concessions stands firm and unshaken by any argument appellees have made. This leaves the order itself without any legal foundation and void.

Appellants pray that the order and decree of the specially constituted District Court of the United States for the Southern District of New York, sustaining the Commission's order of February 2, 1937, (R. 272) be reversed, and that the cause be remanded with directions to the lower Court to grant appellants' prayer for injunctive relief.

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